SUPREME COURT, U.S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. 361

EQUITABLE LIFE INSURANCE COMPANY,
*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Equitable Life Insurance Company, prays that a writ of certiorari issue to review the final Judgment of the Court of Appeals for the Sixth Circuit enforcing a decision and order of the National Labor Relations Board based upon proceedings had in violation of the provisions of the National Labor Relations Act, as amended, herein referred to as the Act, and of Petitioner's constitutional right of due process of the law.

## OPINIONS BELOW

The Circuit Court for the Sixth Circuit entered an order on May 10, 1968 granting enforcement of the Order of the National Labor Relations Board, herein called the Board, upon its petition for enforcement. No printed opinion was filed. A copy of the Court's decree is appended.

The pertinent opinions (decisions) of the Board are as follows:

Decision and Direction of Election, dated September 11, 1962, reported in 138 NLRB 529. (J.A. 9a-15a)[1]

Decision and Order, dated March 25, 1963 reported in 141 NLRB 718.

Supplemental Decision and Order, dated March 1, 1967, reported in 163 NLRB No. 28.

## JURISDICTION

The judgment of the Court of Appeals was dated and entered May 10, 1968. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether the Board, having articulated reasons (Supplemental Decision in *Metropolitan Life Insurance Company*, 156 NLRB 1408) for its unit determinations in the insurance industry *on remand* from this Court (*N.L.R.B.* v. *Metropolitan Life Insurance Company*, 380 U.S. 438) has reasonably exercised its statutory discretion in applying such criteria in establishing a unit of debit agents confined to three of thirteen offices in the State of Ohio where the facts of the case, including a history of collective bargaining on a state-wide basis, are

[1] References to the record printed as a Joint Appendix are designated "J.A."

inapplicable to such criteria and do not support the findings.

2. Whether the Board's exclusion of evidence pertaining to the extent of organization by the Union of the Company's employees constituted a denial of due process where the asserted reason for such exclusion is that the Board did not give controlling weight to such extent in reaching its decision and therefore the exclusion was not prejudicial.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitution of the United States, Amendment XIV, Section 1: * * * nor shall any State deprive any person of life, liberty, or property, without due process of law.

2. Section 9(b) of the National Labor Relations Act, as amended, 29 U.S.C. sec. 159 (b) (in its pertinent part):

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

3. Section 9(c) (5) of the National Labor Relations Act, as amended, 29 U.S.C. sec. 159 (c) (5).

> In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

## STATEMENT OF THE CASE

This petition seeks review of a judgment of the Court of Appeals for the Sixth Circuit which enforced an order

of the Board directing Petitioner, a life insurance company, herein called the Company, to bargain with Insurance Workers International Union, AFL-CIO, herein called the Union, in a unit composed of debit insurance agents employed in its two separate district offices located in Cleveland, Ohio and a sub-office in Lorain, Ohio.

The Company deliberately refused to bargain with the Union in order to challenge the appropriateness of the certified unit. No unfair practice is involved other than the refusal to bargain.

The Board entered an Order reported in 141 NLRB 718 (1963) finding that Petitioner had violated the statute. Following this Court's opinion in *NLRB* v. *Metropolitan Life Insurance Company*, 380 U.S. 438 (1965) the Board's order was remanded by the Court of Appeals for the Sixth Circuit on May 20, 1965 for further proceedings. Thereafter the Board issued a Supplemental Decision in this matter (163 NLRB No. 28), reaffirming its Order of March 23, 1963, and filed its petition, *upon remand*, for enforcement. The Sixth Circuit issued the Order granting enforcement to which this petition is directed.

The Company conducts its operations from its Home Office in Washington, D. C. and through numerous field offices located in seven states and the District of Columbia. The alleged violation occurred in the State of Ohio wherein it maintains offices in thirteen cities (J.A. 26a). Each such office is under the local supervision of a district manager who has no authority whatever in deciding questions affecting the employees in the context of collective bargaining. (J.A. 45a, 47a, 48a, 49a, 50a, 51a).[2] The

[2] The uncontradicted evidence is that the single district office in this Company is *not* a self-contained unit and does not operate autonomously. The record actually shows that there is no local or district authority over (1) hiring, (2) firing, (3) suspension, (4) disciplinary action, (5) duties, (6) rates of pay, (7) hours, (8) retirement benefits, (9) group life insurance benefits, (10) medical

Board itself found (Decision, J.A. 12a) that all labor relations policies are established at the Home Office, where authority for deciding all matters relating to hours, wages and working conditions is centralized.

The business of the company is regulated by each state in which it operates. The agents are also under state regulation. The Company and the agents must be licensed by the state. Their operations are subject to state supervision. Consequently, Company operations are on a state-wide basis.

The majority[3] found (J.A. 12a) that there is virtually no exchange or transfer of agents among these offices, and that there is no business or social contact among the agents in these offices, except on the individual office level.

The history of collective bargaining relating to the debit agents herein involved (J.A. 58a, 62a, 74a, 75a), as well as those of fellow agents of this Company in other states than Ohio, has been on a state-wide basis—that is every office in the particular state has been grouped in one unit. At time of hearing this Company had *current* contracts with the Union covering debit agents on a state-wide basis in the District of Columbia, continuously for 22 years to date of hearing (J.A. 62a), and in the State of Delaware continuously from 1952 to date of hearing (J.A. 65a, 66a).

Thus this record shows a present current history of bargaining with this Union affecting agents in other areas on a broader (state-wide) unit basis.

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and disability benefits, (11) transfers, (12) promotions, (13) leaves of absence, (14) holidays, (15) changes in territory, (16) agents' training schedules or program content, (17) purchase of supplies and equipment (18) incurring new expenses, (19) advertising, or (20) origination of sales material. Every iota of evidence points to the complete absence of any autonomy at this local level.

[3] *Equitable Life Insurance Company*, 138 NLRB 529 3 to 2 opinion.

The Board in a 3 to 2 opinion approved the Union's unit request in the underlying representation case, 138 NLRB 529, *supra*, finding the individual district office to be inherently appropriate for bargaining and the grouping of the offices into one unit to be justified by cogent geographic considerations, in the absence of recent collective bargaining history (J.A. 12a).

The *dissent* of the minority of two members concluded that the unit was inappropriate stating:

> "The Union here seeks—and the majority is finding appropriate—a unit of debit agents employed by the Employer in its two separate district offices in Cleveland, Ohio, and the detached office in Lorain, Ohio. We would dismiss the petition, not only because the unit is less than Statewide in scope and therefore inappropriate (see the dissenting opinion in Quaker City Life Insurance Company, 134 NLRB No. 114), but also because the location of these offices, the factor relied upon by the majority, is not a cogent reason for grouping these debit agents into one unit. As the majority points out, the district offices operate independently of one another, the debit agents employed in these different offices have separate, immediate supervision, there is virtually no interchange or transfer between the offices, and there is no business or social contract between the debit agents in the district offices. Thus, there is lacking here evidence that these debit agents employed in these different offices share a community of interest, with respect to the unit sought, warranting establishment of such a unit. It appears to us that this unit is one based upon extent of organization.
>
> For the foregoing reasons we would dismiss the petition. See our dissenting opinion in *Metropolitan Life Insurance Company*, 138 NLRB No. 64."

As indicated the Company refused to bargain in order to challenge this unit determination. A majority of the Board issued the decision embodied in *Equitable Life In-*

*surance Co.*, 141 NLRB 718 (supra) which was reaffirmed *on remand* on the rationale of its Supplemental Decision in *Metropolitan Life Insurance Company, supra.*

## REASONS FOR GRANTING THE WRIT

1. The decision of the Board is in conflict with and violates the very guiding principles enunciated by it in its Supplemental Decision in *Metropolitan Life Insurance Company, supra*, and is not supported by the substantial evidence.

*On remand* in that case, as in this, the Board stated that it looks to "such factors as the community of interest among the employees to be represented; whether they comprise a homogenous, identifiable, and distinct group; whether they are interchanged with other employees; the extent of common supervision; the previous history of bargaining; and the geographic proximity of various parts of the employee's operation." And, at 1417 in further explication of geographic considerations and bargaining history the Board held that "a city, a metropolitan area, a state, cover well-defined geographical areas. Each of these areas represents a possible appropriate area grouping for bargaining purposes. No one of these areas, in *the absence of bargaining history . . . is exclusively appropriate.*"

The undisputed factual record, including the findings of the majority of the Board, negative each of these factors in the case at bar. Let us examine each criterion cited by the Board, and the manner in which it was applied, or not applied, to the facts in this case.

a) *The factors of community of interest among the employees, and interchange.* The employees involved are in three separate offices. Two are in Cleveland, Ohio, 10 miles apart, and the other is in Lorain, Ohio, 28 miles from Cleveland (J.A. 11a, 56a). The Board found that there is no interchange or transfer of agents among the

offices, and there is no business or social contact among the agents in these three offices. (J.A. 12a). Thus it is clear that the record belies any community of interest among such employees. They are not a homogenous, identifiable and distinct group because of any specific valid characteristic which logically should group them for bargaining purposes. As the *Dissenting Opinion* of the Board shows: "Thus there is lacking here evidence that there debit agents employed in different offices share a community of interest . . ." (J.A. 14a)

b) *The factor of extent of common supervision.* The Board's own finding of fact is to the contrary. It has found each office to be a separate administrative entity" with its own separate supervision. The absence of common local supervision over the three separate offices as a group should tend to preclude the finding of the group as appropriate.

c) *The factor of geographic proximity.* In its representation Decision, which underlies this entire case, the Board majority held, without clarification, that the individual separate offices may be grouped together because of "cogent geographic considerations" (J.A. 12a). This factor, *on remand*, is termed "geographic proximity", meaning "an area clearly defined and sufficiently compact so that a single bargaining unit will permit the employees to exercise their collective bargaining rights under the Act". In the instant case, it is used to support the grouping of two separate offices in Cleveland, 10 miles apart, with an office in Lorain, 28 miles distant (J.A. 11a, 56a), in one single unit. In another case *Western and Southern Life Insurance Company*, 138 NLRB 538 (1962), where the same factors existed, the Union received approval for *separate* units of two district offices—only 7 miles apart —and located 12 to 14 miles from three other district offices all five of which are in the Pittsburgh metropolitan area. The reason for such approval, as in the instant

case, was fundamentally because the Union sought such units the Board concluding (at p. 540). "Therefore, *as the Petitioner in the case is requesting single district units* at the Employer's offices . . . we find that separate units . . . at these two offices constitute units appropriate for collective bargaining" (emphasis supplied).

Over-riding all the rhetoric of the Board's rationale is the inevitable end result *in every case* that the unit approved is the one that *coincides precisely* with the extent to which the union has successfully organized. In this case there is nothing reasonably compact in the grouping of these offices so widely separated that their very separation has deterred any social or economic contact leading the *dissenters* to conclude that the unit was based on extent, and therefore invalid, since the "location of these offices, the factor relied on by the majority, is not a cogent reason for grouping these debit agents into one unit" (J.A. 14a).

d) *The factor of bargaining history.* In further explication, *on remand*, of its reasoning for grouping various separate offices in a geographic area or areas the Board announced the principle that "*no one of these areas, in the absence of bargaining history is exclusively appropriate*". (emphasis supplied) *Metropolitan*, 156 NLRB at 1412. Conversely an area, whether a city or State, is exclusively appropriate where bargaining history in fact supports it. The facts recited, *supra*, show that this company and this union had agreements currently in existence at date of hearing on a state-wide unit basis covering this very class of employees (debit agents) in two states. Furthermore the employees in these three offices here involved had been in a state-wide unit under collective bargaining contracts between the Company and the Union. Finally, these same employees had voted in a Board election, lost by the Union, in a state-wide unit,

*barely 13 months*[4] prior to the Union's petition confined to these three offices. This history alone militates against the approval of a unit less than state-wide in scope, even assuming, *arguendo*, that the individual district office may be appropriate under other facts.

In view of the inapplicability of the criteria to the facts of this case, the inescapable conclusion is that this unit is based upon extent of organization contrary to the mandate of Sections 9(c) (5) of the Act. Certain it is that this record does not support the findings of the Board. There is lacking that substantial evidence which "is the dividing line between law and arbitrary power". *NLRB* v. *Thompson Products, supra.*

2. The Board's exclusion of evidence pertaining to the extent of organization by the Union of the Company's employees constitutes a denial of due process where the reason for such exclusion is the Board's assertion that it did not give controlling weight to such extent in reaching its decision and therefore it need not hear evidence thereon.

The Company attempted to introduce evidence relating to the extent of the Union's organizational activities in Ohio. The objective was to make a full record so that the Board could be fully informed in the discharge of its statutory discretion in unit determinations, particularly in the light of Section 9(c) (5), *supra*, which prohibits extent as the controlling factor in unit decisions. The Board's reason for excluding such evidence was that it did not give controlling weight to extent in arriving at its decision (J.A. 9a) so that it was not error to exclude it. The extraordinary premise of this conclusion is that evidence may be dispensed with because it would not have affected the outcome, or that the Board has been in some manner able to evaluate rejected testimony without even

[4] Election on state-wide unit in Ohio, including the three offices here involved, held December 20, 1960. Union filed underlying petition herein on January 11, 1962.

hearing it. This is not due process. This Court has repeatedly held that where the Congress has granted so broad a power within the realm of administrative discretion, "all the more insistent is the need, when power has been bestowed freely, that the inexorable safeguard of a fair and open hearing be maintained in its integrity". *Ohio Bell Tel. Co.* v. *Public Utilities Comm.* 301 U.S. 292, 304. And the Eighth Circuit declared in *N.L.R.B.* v. *Burns, et al*, 207 F. 2d 434, 436 (1953), quoting from *Donnelly Garment Co.* v. *N.L.R.B.*, 123 F. 2d 215, 224 (C.A. 8):

> "That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it amounts to a denial of due process is not open to debate . . . . *That the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point.* The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. See National Labor Relations Board v. Thompson Products, Inc., 6th Cir., 97 F 2d 13, 15; Foore Bros., Gear & Mach. Corp. v. National Labor Relations Board, 7th Cir., 114 F 2d 611, 621." (emphasis supplied).

The Court below fell into the same error holding that there was no prejudice in the exclusion since "the extent of organization cannot be given controlling weight . . ." and, consequently, evidence thereon is apparently immaterial. However the point is *not* that extent cannot be given controlling weight in unit determination but rather *that a litigant has the right to invoke the exercise of the Board's discretion upon a full and fair consideration of all the relevant evidence.* Such evidence is relevant to the Board's inquiry and upon due consideration *may* be persuasive weight in the exercise of its discretion.

The right to such a fair hearing is one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. *Ohio Bell Tel. Co., supra*, at 305. This case represents a classical denial of due process and is particularly repugnant to the concept of a fair hearing since the evidence was directly related to the exercise of the Board's discretion. The Board may not avoid its constitutional obligations to litigants in this arbitrary fashion.

## CONCLUSION

It is respectfully submitted that the Court review this matter because of the Board's failure to conform its unit determination to the very principles which it itself enunciated *on remand* from this Court, and because it denied due process to Petitioner.

It is respectfully submitted that the petition for certiorari be granted.

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August 1968.

# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 17,851

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

*vs.*

EQUITABLE LIFE INSURANCE COMPANY,
*Respondent.*

Before: CELEBREZZE and MCCREE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

## ORDER

Equitable Life Insurance Company, Respondent, has refused to bargain with the certified bargaining representative of a group of its employees in order to contest the National Labor Relations Board's determination of the appropriate bargaining unit. The Board entered an order, reported at 141 NLRB 718 (1963), finding that Respondent had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), and petitions this Court to enforce that order.

A group of Respondent's two Cleveland offices, Cleveland East District Office and Cleveland West District Office, and a detached office in Lorain, Ohio, which is administratively attached to the Cleveland West Office, was found by the Board to be an appropriate bargaining unit. In its Decision and Direction of Election reported at 138 NLRB 529 (1962), the Board articulated its reasons for finding this grouping appropriate. Our review is limited to a determination of whether in reaching its decision the Board has violated the proscription of Section 9(c)

(5) of the Act, 29 U.S.C. § 159(c)(5), by giving controlling weight to the extent of organization or has otherwise abused its discretion. *Metropolitan Life Insurance Company* v. *National Labor Relations Board*, 330 F.2d 62 (6th Cir. 1964) *vacated and remanded on other grounds* 380 U.S. 525 (1965). We do not find such an abuse in this case.

Respondent also contends that it was denied due process because the Board excluded its evidence concerning the extent of union organization. Since the extent of organization cannot be given controlling weight by the Board and since the apparent object of the Respondent, both before the Board and on this appeal, has been to show that the only appropriate unit is state-wide or company-wide, it is difficult to conceive how it was prejudiced by the exclusion of evidence concerning the extent of union organization. We find no merit to the contention.

It is therefore ORDERED that the National Labor Relations Board's petition for enforcement of its order be, and it is, hereby granted.

ENTERED BY ORDER OF THE COURT
/s/ Carl W. Reuss
Clerk

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No. 857

In the Supreme Court of the United States

OCTOBER TERM, 1957

EQUITABLE LIFE INSURANCE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 361

EQUITABLE LIFE INSURANCE COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The order of the court of appeals (Pet. 13–14) is not yet officially reported. The Board's decision and order in the unfair labor practice case are reported at 141 NLRB 718 (J.A. 2a–9a);[1] its decision in the related representation case is reported at 138 NLRB 529 (J.A. 9a–15a); and its supplemental decision is reported at 163 NLRB No. 28 (Pet. 27–31).

[1] "J.A." refers to the Joint Appendix filed in the court below.



317-808—68——1

## JURISDICTION

The order of the court of appeals was entered on May 10, 1968 (Pet. 2). The petition for a writ of certiorari was filed on July 31, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the National Labor Relations Board acted reasonably in establishing a collective bargaining unit consisting of the insurance agents at the employer's two Cleveland offices and a sub-office at Lorain, Ohio.

2. Whether evidence concerning the union's motive in seeking the unit found to be appropriate by the Board was properly excluded.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition, p. 3.

## STATEMENT

Petitioner is engaged in the sale of insurance in seven states and the District of Columbia (J.A. 10a; 26a). On January 11, 1962, the Union[2] petitioned the Board for certification as bargaining representative of insurance agents at the Company's two dis-

[2] Insurance Workers International Union, AFL-CIO.

In 1960 the Union lost an election for a state-wide unit of agents (J.A. 57a–62a). At that time it was Board policy that units of insurance agents less than state-wide or company-wide would not be established. That policy was reversed in *Quaker City Life Insurance Co.*, 134 NLRB 960, enforced, 319 F. 2d 690 (C.A. 4).

trict offices and one detached office in the metropolitan and suburban area of Cleveland, Ohio (J.A. 29a). Pursuant to Section 9(c)(1)(A) of the Act (29 U.S.C. 159(c)(1)(A)), a hearing was held on the petition, and the Board made the following findings:

The Company maintains numerous district offices throughout the seven state area. For administrative purposes, these offices are grouped in two divisions, each of which is headed by a division superintendent (J.A. 10a, 31a). Division II is composed of 16 district offices, 3 situated in Delaware and 13 in Ohio. The 13 Ohio offices are staffed by about 185 agents, 42 of whom work out of the offices involved herein (J.A. 10a; 30a–32a, 56a). Each district office services an assigned geographic area, and on occasion will have in its territory a "detached" office over which it exercises administrative control (J.A. 97a). There are two district offices in Cleveland, and a detached office at Lorain, some 28 miles from Cleveland, which is under the administrative control of the Cleveland West office (Pet. 22).[3]

Each district office is under the general supervision and direction of a district manager (J.A. 41a), who is directly responsible to his division superintendent (J.A. 11a; 32a). While a manager has no final authority to hire agents, he solicits applications when openings arise in his office, conducts personal interviews with the applicant, administers an aptitude test, and orders retail credit and medical reports on the ap-

[3] The nearest other district office is at Akron, Ohio, approximately 30 miles away from Cleveland (J.A. 11a; 84a).

plicant (J.A. 11a; 39a–42a). The manager thereafter forwards the application together with his recommendation to the home office and the manager's recommendation is followed over 70 percent of the time (J.A. 11a; 39a–40a, 46a–47a). New agents undergo a 13-week training course that is carefully supervised by the manager and he is thereafter responsible for conducting refresher courses and supervising the agents (J.A. 11a; 42a–43a; 73a).

Agents spend most of their time selling insurance in an assigned territory, but they are required to report to the district office three times weekly (or as often as the manager directs) to deposit premiums, turn in applications, and pick up mail (J.A. 11a; 32a–33a). Although a manager has no authority to discharge an agent, he investigates any complaints made about an agent's competence, handles grievances involving the agent, recommends discipline or discharge, and may order an audit of an agent's accounts (J.A. 11a; 46a, 48a–49a, 77a–78a, 70a–71a).

There is little or no interchange or transfer of agents among the various offices and the only business or social contact among agents is in the individual district office (J.A. 12a; 56a–57a). Except for ordinary life insurance, an agent must confine his sales to either his own or the district office's assigned area (J.A. 34a–35a).

Upon these facts, the Board found that the individual district office is a separate administrative entity, and therefore is inherently appropriate for purposes of collective bargaining (J.A. 12a). The

Board further found that geographic considerations, the absence of recent collective bargaining [illegible] and the fact that no union sought to repr[illegible] broader unit, justified grouping into one unit [illegible] district offices in Cleveland and the Lorain office [illegible] is administratively linked to the Cleveland West office (*ibid.*).[4] Accordingly, the Board directed an election in that unit, which the Union won, and it was certified (J.A. 13a–14a).

When petitioner refused to bargain with the Union, an unfair labor complaint issued, and the Board found that the Company had violated Section 8(a)(5) and (1) of the Act. The Board directed the Company to cease and desist from its unfair labor practice, to bargain with the Union upon request, and to post appropriate notices (J.A. 2a–3a, 6a).

The Company refused to comply with the Board's order, and the Board petitioned the court of appeals to enforce it. While the petition was pending, this Court decided *National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, in which it remanded a similar unit question to the Board for a further explication of its views. The court below thereupon remanded the instant case to the Board for further proceedings consistent with this Court's decision in *Metropolitan*.

---

[4] At the hearing, petitioner sought to introduce evidence designed to show that the Union was motivated by the extent of its organization in requesting the unit which it did. The hearing officer excluded the evidence on the ground that the Union's motive was legally irrelevant. The Board sustained this ruling. (J.A. 97a–100a; 9a, n. 1.)

On remand the Board reaffirmed its initial decision and order. The Board found that petitioner's operations were essentially the same as those in *Metropolitan Life Insurance Co.*, 156 NLRB 1408, and *Western and Southern Life Insurance Co.*, 163 NLRB No. 14, enforced, 391 F. 2d 119 (C.A. 3), where it had reexamined and reaffirmed its conclusion that "the district office is the insurance industry's analogue of the single manufacturing plant, which the Act recognizes as presumptively appropriate" (Pet. 29). The Board further found that the two offices in Cleveland were appropriately grouped in one unit because of their geographic proximity, and that the Lorain office was also appropriately included since it was administratively part of the Cleveland West office (Pet. 30–31. The court of appeals enforced the Board's order. (Pet. 13–14.)

## ARGUMENT

1. Petitioner's contention that the unit established by the Board was improper entails essentially an attack on the evidentiary support for the Board's findings of fact, which were sustained by the court of appeals. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. At all events, the court below correctly sustained the Board's unit determination.[8]

[8] Section 9(b) of the Act empowers the Board to decide whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." In view of this broad grant of power, and the expertise involved in such determination, the Board's selec-

As shown in the Statement, the district manager exercises immediate supervisory authority over the agents assigned to his office; the sales force of each office operates in its own assigned territory; and there is virtually no interchange of agents among offices. The district manager recruits agent applicants and forwards their applications with his recommendation to the home office; his recommendation usually is followed. The manager conducts a training program for newly hired agents; may recommend the discharge of an agent; and may order the audit of an agent's account whenever he thinks it is necessary. These factors demonstrate that each district office is a separate administrative entity, and, as such, is an inherently appropriate unit. See *National Labor Relations Board* v. *Western & Southern Life Ins. Co.*, 391 F. 2d 119 (C.A. 3); *Corrie Corp. of Charleston* v. *National Labor Relations Board*, 375 F. 2d 149, 154–155 (C.A. 4); *National Labor Relations Board* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690 (C.A. 4); *Metropolitan Life Insurance Co.*, 156 NLRB 1408. It is well established that a unit of two or more district offices may be an appropriate unit if there is a rational basis for grouping them. Here the grouping is supported by the fact that the two Cleveland offices are located in a separate and distinct geographical area,

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tion of an appropriate unit is not to be disturbed unless the agency has acted arbitrarily or capriciously (*Packard Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491–492), or has failed to articulate fully the basis for its determination (*National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438). The court below found that neither of these defects existed here.

namely, the City of Cleveland, and that the Lorain office is administratively linked to the Cleveland West office.

2. There is no substance to petitioner's contention (Pet. 10–12) that the Board erred in excluding evidence of the scope of the Union's organizational activities. The evidence which petitioner sought to introduce would show that the Union had only been successful in organizing the agents in the unit in question (n. 4, *supra*). But the fact that Section 9(c)(5) of the Act (Pet. 3) precludes the Board from giving controlling effect to the extent of union organization does not mean that the Board need reject an otherwise appropriate unit because the Union has confined its organizational activity to that unit.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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